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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1959

LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954, PETITIONER

v.

CHARLES H. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 27–42)[1] is reported at 269 F. 2d 827. The opinion of the District Court (R. 299a–338a) is reported at 164 F. Supp. 130.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1959. The time for filing a petition for a writ of certiorari was extended by order of

[1] Pages in the petition are referred to as "Pet. ——"; to the appendix of the petition as "Pet. App. ——"; and to the appendix of appellant in the Court of Appeals as "R. ——."

Mr. Justice Harlan, dated November 26, 1959, to and including December 15, 1959. The petition was filed on December 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 11 U.S.C. 521 and 47.

QUESTION PRESENTED

Whether fees awarded by a district judge in a reorganization proceeding under Chapter X of the Bankruptcy Act to a trustee under a collateral trust agreement and to his counsel were reasonable.

STATEMENT

This petition arises out of a proceeding under Chapter X of the Bankruptcy Act (11 U.S.C. 501 *et seq.*) for the corporate reorganization of General Stores Corporation.

Petitioner was trustee for himself and the Rexall Drug Company under a collateral agreement with the debtor made in connection with the debtor's purchase, on May 19, 1954, for $2,800,000 of all the stock of Ford Hopkins Company, a drug store chain, from petitioner, his wife, and Rexall Drug Company. The Ford Hopkins Company stock and the capital stock of Steinway Drug Company, another subsidiary of the debtor operating a chain of drug stores, were deposited by the debtor as security under the collateral agreement for purchase-money installment notes in the amount of $2,065,000. As collateral trustee, petitioner controlled both chains and continued to do so throughout the subsequent reorganization of

the debtor.[2] By the terms of the collateral agreement, the trustee thereunder was entitled to be paid by the debtor "for all services rendered in the execution of the trusts" after default and for all fees for counsel employed "in the execution of said trusts" (R. 24a–25a).

Petitioner sought compensation for his services in the amount of $112,715, which was at the rate of $35,000 per annum from October 18, 1954, when the default under the collateral agreement was alleged to have occurred. This would have been in addition to an expense allowance up to $25,000 per annum received by petitioner from the subsidiary drug store chains (R. 29a, 320a). The Commission recommended that he receive for his services $10,000. Because of its view that petitioner had waived the default occasioned by the debtor's filing of a petition under Chapter XI of the Bankruptcy Act until the subsequent filing of an amended petition under Chapter X,[3] the Commission suggested that the period for which petitioner should receive compensation did not com-

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[2] To insure that petitioner would not, through his control, cause expenditures which might frustrate the reorganization, the court prohibited the expenditure of extraordinary sums in the conduct of the subsidiaries' business without advising the reorganization trustee and without approval of the court in the event of the reorganization trustee's objection. This order was affirmed, *Ruskin* v. *Griffiths*, 250 F. 2d 875 (C.A. 2).

[3] This Commission and a stockholder moved to dismiss the Chapter XI proceeding on the ground that Chapter X provided a more appropriate remedy for reorganization of the debtor. These motions were granted and ultimately affirmed by this Court. *General Stores Corporation* v. *Shlensky*, 350 U.S. 462.

mence until after the filing of the amended petition under Chapter X, on April 30, 1956—a period of only twenty months. For petitioner's services during this period, the Commission believed an annual rate of $6,000 was appropriate. The District Court concluded that payment should embrace petitioner's services subsequent to the filing of the Chapter XI petition. At the rate recommended by the Commission the mathematical computation of the total fee for the indenture trustee, since October 18, 1954, would have aggregated somewhat in excess of $19,000. The District Court, however, awarded $24,215, since it applied a $6,000 rate only until the filing of the Chapter X petition and a rate of $9,000 for the period subsequent thereto (R. 320a–321a, 367a).

The District Court noted that the activities and operations for which petitioner claimed credit were neither unusual nor in advance of the established trends in the drug industry (R. 318a). His activities connected with the subsidiaries' operations were found to be only remotely related "to the execution of the trusts." The subsidiaries were solvent and actively engaged in operating drug store chains throughout the proceedings affecting their parent; their operations were uninterrupted and unaffected by the debtor's court involvement, except for some initial uncertainty; they were staffed at all times by executives of petitioner's own choosing, who had years of experience in the operation of drug store chains and who directed the combined operation which was effected shortly after the debtor acquired the stock of Ford Hopkins Company. The District Court deter-

mined that "no convincing evidence of the necessity of the trustee's activities in the execution of * * * [the debtor's] policies for the purpose of the execution of his trust appears" (R. 318a).

With respect to counsel, the District Court allowed $60,000 for legal services performed under the collateral agreement, although $180,000 had been sought. This allowance was in accord with the recommendation of the Commission. The District Court noted (R. 324a, 325a, 328a) various instances of duplication arising from the employment of two law firms, one of which assigned fourteen lawyers to the case (R. 247a–248a); it pointed to unnecessary or wholly abortive legal effort which accounted for a substantial portion of the recorded services of the attorneys involved (R. 325a–326a); it concluded that the issues were not complex and required no unusual skill nor arduous legal effort (R. 327a–330a); it noted that substantial time was spent by junior associates (R. 329a); and it took into consideration the fact that one of the law firms involved was receiving an annual retainer from Ford Hopkins Company of $15,000 (R. 327a–328a).

The Court of Appeals unanimously affirmed the District Court with respect to its determinations as to the allowances for the indenture trustee and its counsel.

ARGUMENT

The petition presents merely the question of the quantum of compensation awarded to particular applicants. No significant question of administration

under Chapter X of the Bankruptcy Act is involved and there is no occasion for review by this Court.

Petitioner's contentions that the Court of Appeals has given the Commission a "fact-finding status" (Pet. 19) and accorded the Commission "the role of making binding recommendations" (Pet. 23) are without basis. As noted above, the District Court disagreed with the Commission with respect to the allowance for petitioner's services. In affirming, the Court of Appeals merely stated (Pet. 37–38) that "an appellate court would be less than wise if it did not rely heavily for guidance in such matters * * * [*i.e.*, fee matters] upon the SEC which functions as a responsible, disinterested public agency * * * [citing cases] and the district court whose intimate knowledge of the whole reorganization gives it peculiar advantage * * * [citing cases]." The Court of Appeals also quoted (Pet. 41–42) from its earlier decision in *Finn* v. *Childs Co.*, 181 F. 2d 431, 438 (C.A. 2), declaring that the Commission's recommendations with respect to fees "are not 'mere casual conjectures,' but are 'recommendations based on closer study than a district judge could ordinarily give to such matters.'"

Petitioner argues that the Second Circuit's view, as expressed in *Finn* v. *Childs*, *supra*, is inconsistent with the views of other circuits with respect to the weight to be given the Commission's fee recommendations.[4] But, as noted by the Second Circuit in the

[4] This is based in part on two cases cited in *Finn* v. *Childs* (181 F. 2d at 438): *Cooke* v. *Bowersock*, 122 F. 2d 977, 985 (C.A. 8); and *In re Detroit International Bridge Company*,

subsequent case of *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862, 865 (C.A. 2), certiorari denied, 361 U.S. 862, "ultimately * * * the court's determination must be made on the facts and circumstances of each case." In the instant case, moreover, since the Court of Appeals affirmed a determination of the District Court which varied from the Commission's recommendation, there does not appear to be an issue with respect to the alleged "re-

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111 F. 2d 235, 237–38 (C.A. 6). In both of these cases, the ultimate fees allowed by the Court of Appeals were substantially less than the Commission's recommendations. The statements in these cases respecting the Commission's recommendations are, in the former case, that it is "the exclusive function of the court and not of the Commission to make the findings, conclusions and allowances" (122 F. 2d at 985), and in the latter case that "while * * * entitled to weight, [Commission recommendations] are not conclusive" (111 F. 2d at 238). These statements hardly justify the comment in *Finn* v. *Childs* (181 F. 2d at 438) that the courts involved refused to give S.E.C. recommendations as to fees more weight than the suggestions of any other party; rather, they indicate that the Commission's recommendations in those cases did not impress the appellate courts as being as well "reasoned" as those involved in *Finn* v. *Childs* (*Id.* at 437). *In re Solar Manufacturing Corp.*, 215 F. 2d 555 (C.A. 3) (Pet. 24) is wholly in accord with *Finn* v. *Childs* and, indeed, in that case, as in *Finn* v. *Childs*, the Court of Appeals directed that certain allowances of the District Court substantially in excess of the Commission's recommendations be reduced to the sums recommended by the Commission. Nor is there anything inconsistent with *Finn* v. *Childs* in *In re Chicago Rys. Co.*, 160 F. 2d 59, 69 (C.A. 7), the remaining case set forth in the petition in this connection, and cited for the proposition that the Commission's report on a plan of reorganization is not "evidence" but only advisory (Pet. 24). *Finn* v. *Childs* deals only with fees and nowhere indicates that the Commission's recommendation is "evidence."

quirement" that the reorganization court follow "the recommendation of the Commission on fees and allowances unless for reasons otherwise based on specific findings" (Pet. 20–21). In any event, an instruction of the Court of Appeals, such as that in *Finn* v. *Childs, supra,* 181 F. 2d at 438, that the recommendation of the Commission "should not be exceeded without definite findings and conclusions showing why this step is deemed necessary" cannot impair the judicial function of the reorganization court, since it requires no more than the traditional recital by the court of the reasons for its decision.

The fact that the Commission may have participated in the litigation of issues with various of the fee applicants in no way disqualifies it from making recommendations as to their fees, as suggested in the petition (p. 22). A public body, such as the Commission, should no more be expected to be unfair by reason of such litigation than would a district judge who must pass upon fees of parties who may have successfully prosecuted appeals from his decisions. Since the Commission was active throughout the proceeding there was no reason why it should not have made available to the district judge its views with respect to the reasonableness of the fees sought, whether these were to be awarded in terms of benefits conferred

upon the debtor or as reasonable amounts to be paid under a collateral lien agreement.[5]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] In providing for participation by the Commission in Chapter X proceedings, Congress intended to provide the courts with "the benefit of expert and disinterested advice to aid it in the solution of the complicated financial and legal problem[s] involved in the typical large reorganization." H. Rep. No. 1409, 75th Cong., 1st Sess. (1937), p. 48.

The claimed "inconsistency" of the Commission's position with respect to the interest rate applicable to the purchase money notes (see Pet. 21–22) is, of course, irrelevant to the issue respecting fees. We submit that the Commission's recommendations in this case are consistent with the position taken by the Commission in other cases.

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